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No. 02-749

IN THE

Supreme Court of the United States

RAYTHEON COMPANY, *et al.*,
Petitioners,

v.

JOEL HERNANDEZ,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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December 13, 2002

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of Petitioners in this case. The written consent of Petitioners Raytheon Company, *et al.*, has been filed with the Clerk of the Court. Counsel for Respondent Joel Hernandez has not consented.

In support of its motion, EEAC by the following shows that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations.

2. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. In addition, EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

3. All of EEAC's member companies are employers subject to Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117, and many are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, as well as other workplace nondiscrimination laws.

4. As employers, and as potential defendants to employment discrimination claims asserted under these laws, EEAC's members have a substantial interest in the issue presented in this case—*i.e.*, whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use.

5. Many of EEAC's member companies, if not all, have adopted standards governing the conduct of employees in the workplace, including rules prohibiting the use of, or being under the influence of, illegal drugs and alcohol on the job. Many of these rules are grounded in the need to prevent workers from being injured or killed on the job, or from killing or injuring others, either in the workplace or among the general public. For these companies, an employee's rule infraction that is serious enough to warrant termination also makes the offender ineligible for rehire at a later date, and for the same reason.

6. The decision of the Ninth Circuit in this case—that an employer's policy against rehiring former employees terminated for violating a company conduct rule violates the ADA as a matter of law—turns disability discrimination law upside down, creating a shield behind which anyone who claims "my disability made me do it" can hide from accountability for his or her actions. In addition to rewarding drug abuse, the decision confers potential ADA protection on any employee who is terminated for criminal actions such as violence toward a co-worker, theft of company property or funds, and the like. EEAC's brief provides the Court with information concerning the direct conflict between the decision below and those of other circuit courts of appeals. It also highlights for the Court the reasons why the case is of exceptional importance.

7. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the Court grant it leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use.

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* contingent on the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel for amicus curiae authored this brief in its entirety. No person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes approximately 340 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are employers subject to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities.

EEAC's members include chemical and other manufacturing companies, oil refineries, airlines, pharmaceutical manufacturers, railroads, health care providers, nuclear power companies, defense contractors, and many others. Many if not all of EEAC's members have adopted standards governing the conduct of employees in the workplace, including rules prohibiting the use of, or being under the influence of, illegal drugs and alcohol on the job. Many of these rules are grounded in the need to prevent workers from being injured or killed on the job, or from killing or injuring others, either in the workplace or in the general public. For

these companies, an employee's rule infraction that is severe enough to warrant termination also makes the offender ineligible for rehire at a later date, and for the same reason.

Thus, EEAC's members are directly affected by the Ninth Circuit's decision in this case. The court below concluded that an employer's policy against rehiring former employees terminated for violating a company conduct rule violates the ADA as a matter of law. It thus creates an automatic "back door" for former employees to whom the front door is barred due to their violation of a company rule.

The decision below turns disability discrimination law upside down, making it a shield behind which anyone who claims "my disability made me do it" can hide from accountability for his or her actions. In addition to rewarding drug abuse, it confers potential ADA protection on any employee who is terminated for criminal actions such as violence towards a co-worker, theft of company property or funds, and the like. The Ninth Circuit's unprecedented interpretation of the ADA is contrary to prior decisions of other circuit courts of appeals and involves a question of exceptional federal importance.

STATEMENT OF THE CASE

Joel Hernandez was a Calibration Service Technician for Hughes Missile Systems Company [2] when he tested positive for cocaine in a July 1991 drug test. Pet. App. 2a. The company gave him the option of resigning in lieu of termination, and he did. *Id.*

In January 1994, Hernandez again applied for a job at Hughes. *Id.* The company rejected his application because

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[2] Hughes Missile Systems Company has since been acquired by Raytheon Company. Pet. App. 1. Since the relevant events occurred prior to the acquisition, we will refer to Petitioners collectively as "Hughes" or "the Company."

his record indicated that he was ineligible for rehire due to personal misconduct, *i.e.*, violation of a company policy that mandated termination or resignation in lieu of termination. Pet. App. 4a. Hernandez subsequently filed an ADA charge with the Equal Employment Opportunity Commission, contending that Hughes discriminated against him on the basis of his having a record of a drug addiction. *Id.* When he subsequently sued Hughes on the same grounds, the trial court granted summary judgment in favor of Hughes. Pet. App. 16a–17a. Hernandez appealed.

The Ninth Circuit ruled that Hughes' policy against rehiring any former employee terminated for violating a conduct rule "violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction." Pet. App. 11a. The court below rejected Hughes' argument that the policy is nondiscriminatory because it does not single out employees with a record of drug addiction or treat them any differently from other employees fired for using drugs or for violating other conduct rules that require termination and a bar from rehire, such as rules against fighting or stealing. Pet. App. 10a–11a. Hughes now seeks review by this Court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision conflicts directly with the decisions of several other circuit courts of appeals holding that an employer may refuse to rehire a former employee who was terminated for violating a company conduct rule even if the conduct allegedly was caused by a disability. *E.g., Harris v. Polk County, Iowa*, 103 F.3d 696, 697 (8th Cir. 1996). The decision below likewise cannot be reconciled with the numerous decisions of other circuits which have held that "the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability." *Jones v. American Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999).

Indeed, the Equal Employment Opportunity Commission, which enforces Title I of the ADA, has stated time and again that employers may enforce legitimate conduct standards as long as they do so consistently, and need not retroactively forgive misconduct if they learn it was caused by a disability. *E.g., EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Mar. 1, 1999) at 34, *reprinted in* EEOC Compl. Man. (BNA) N:2465, N:2480. Moreover, the ADA itself supports an employer's efforts to prevent drug abuse in the workplace, providing specific permission for employers to hold drug abusers to the same standards as other employees. 42 U.S.C. § 12114(c)(4).

Review and reversal of the decision below is immensely important to employers, who find it devastating to their efforts to manage employees. Work rules, and a policy against rehiring those who break them, are crucial tools for maintaining safety, productivity, and legal compliance. The Ninth Circuit's decision provides an automatic "bye" for any offender who can claim that "my disability made me do it."

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS DIRECTLY WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS HOLDING THAT DISCIPLINARY ACTION FOR VIOLATING A WORKPLACE CONDUCT RULE SUCH AS A PROHIBITION ON DRUG USE DOES NOT VIOLATE THE AMERICANS WITH DISABILITIES ACT

A. Several Federal Courts Have Concluded That Refusal To Rehire a Former Employee Terminated for Misconduct Does Not Violate the ADA

Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117, prohibits discrimination in employment against a "qualified individual with a disability" on the basis of a disability. 42 U.S.C. § 12112(a). It does not relieve employees or former employees from the consequences of their misconduct, regardless of whether their wrongdoing may have been triggered by a disability affecting behavior.

Several circuit courts of appeals, in direct contrast to the Ninth Circuit below, have recognized that an employer's decision to disqualify former employees from eligibility for rehire if they were terminated for misconduct does not constitute disability discrimination, even if the underlying conduct allegedly was related to a disability. *E.g.*, *Harris v. Polk County, Iowa*, 103 F.3d 696, 697 (8th Cir. 1996) (holding that employer did not violate ADA by refusing to consider for rehire employee who had been fired several years earlier after criminal conviction for shoplifting, even though she contended that her shoplifting was caused by

mental problems that had been resolved).[3] A number of district courts have reached the same correct conclusion. *E.g.*, *Peyton v. Otis Elevator Co.*, 72 F. Supp.2d 915 (N.D. Ill. 1999) (employer did not violate ADA by refusing to rehire former employee terminated for absenteeism caused by alcoholism); *Thomas v. Mississippi State Dep't of Health*, 934 F. Supp. 768 (S.D. Miss. 1996) (ADA did not require employer to overlook former employee's prior termination for absenteeism and negligence due to crack cocaine addiction).

B. An Adverse Employment Action for Misconduct, Such as Violating a Work Rule, Does Not Violate the ADA Even Though the Misconduct May Be Traceable to a Disability

The basis for these decisions is the fundamental distinction between a disability itself and conduct that allegedly is caused by a disability. The Seventh Circuit's decision in *Pernice v. City of Chicago*, 237 F.3d 783 (7th Cir. 2001), provides a good, and typical, example. The City fired Pernice, a 20-year City employee, after he was arrested and charged with disorderly conduct and possession of cocaine. Pernice sued the City under the ADA, claiming that he had been discharged due to his disability of drug addiction, since his drug possession was 'an integral part' of his disability. *Id.* at 784. The Seventh Circuit, upholding the trial court's dismissal of the complaint, stated unequivocally that "[i]t is well-established that an employee can be terminated for violations of valid work rules that apply to all employees, even if the employee's violations occurred under the influence of a disability. This rule is particularly applicable to employees who violate rules relating to drug or alcohol abuse." *Id.* at 785 (citation omitted).

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[3] The Petition for a Writ of Certiorari provides additional examples. Pet. 10-11.

In so doing, the Seventh Circuit rejected Pernice's argument that the ADA protected him because his disability—drug addiction—caused his actions, stating that "Pernice made a conscious choice to *actually* possess drugs. We therefore have little trouble separating his misconduct from his alleged disability." *Id.* at 787.

Courts have reached the same conclusion with respect to workplace rules against alcohol abuse. *See, e.g., Martin v. Barnesville Exempted Village Sch. Dist. Bd. of Educ.*, 209 F.3d 931, 934 (6th Cir.) (concluding that even if the school district "regarded" the plaintiff as an alcoholic, it had a legitimate, nondiscriminatory reason for refusing to place him in a bus driver position after he was caught drinking on the job), *cert. denied*, 531 U.S. 992 (2000); *Renaud v. Wyoming Dep't of Family Servs.*, 203 F.3d 723, 730 (10th Cir. 2000) (rejecting an ADA claim challenging the dismissal, pursuant to the employer's substance abuse policy, of a school superintendent who came to work drunk, stating that "ADA protection . . . does not extend to an alcoholic's use of alcohol on the job").

Indeed, the same analysis applies to conduct violations traceable to other conditions as well. In *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998), the Fifth Circuit held that an employee's violation of the company's workplace violence policy constituted a legitimate, nondiscriminatory business reason for his termination, even if his conduct was caused by post-traumatic stress disorder (PTSD), noting that "[t]he cause of Hamilton's discharge was not discrimination based on PTSD but was rather his failure to recognize the acceptable limits of behavior in a workplace environment"). The Seventh Circuit ruled that an employer that terminated a front loader driver with sleep apnea for sleeping on the job did not violate the ADA. *Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396 (7th Cir. 2000). The Sixth Circuit did likewise with

respect to a hospital that terminated an anesthesiologist who repeatedly dozed off on the job, noting that there was no evidence that the hospital had treated him any differently than it would have "a physician who slept on the job for another reason, such as staying up late every night to watch television." *Brohm v. JH Properties, Inc.*, 149 F.3d 517, 522 (6th Cir. 1998). In *Hill v. Kansas City Transportation Authority*, 181 F.3d 891, 894 (8th Cir. 1999), *cert. denied*, 528 U.S. 1137 (2000), the Eighth Circuit concluded that where an employee waited until after she twice fell asleep on the job, "a work rule violation she knew would mandate her discharge," before requesting accommodation, the ADA did not require her employer to grant her another chance to better control her own treatable condition. Indeed, as the Fourth Circuit has said, "[t]he law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability." *Jones v. American Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) (holding that employer did not violate the ADA by terminating an employee who threatened his supervisor's life).

The decision below overlooks this crucial distinction, treating Hernandez' workplace cocaine use as a mere incidental consequence of his possible drug addiction. Indeed, the Ninth Circuit described former employees terminated for drug use as individuals "whose only work-related offense was testing positive" because of their addiction. Pet. App. 13a.

On the contrary, the work related offense was illegal drug use, and it is immaterial whether or not the offending employee happens to have an addiction. *See, e.g., Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997) (holding that an employer who fired an employee for threatening to kill another employee did not violate the ADA, even though the threat was caused by her mental

illness, stating "if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act," and quoting "'Was't Hamlet wrong'd Laertes? Never Hamlet./ If Hamlet from himself be ta'en away,/ And when he's not himself does wrong Laertes,/ Then Hamlet does it not; Hamlet denies it./ Who does it then? His madness.' Hamlet, Act V, sc. ii, ll. 229-233").

Since an employer may terminate an employee for workplace misconduct even if caused by a disability, it follows that the employer may refuse to rehire that person for the same reason. In both cases, the reason for the action is the conduct—violation of the work rule—rather than any underlying explanation or excuse for the conduct. *See Harris*, 103 F.3d at 697.

That the Ninth Circuit misunderstood this important distinction is further shown by the comment at n.16 of its opinion (Pet. App. 11a n.16), which characterizes as "interesting," and presumably inexplicable, that an applicant who tests positive for drugs is ineligible to re-apply for 12 months, while the employee who tests positive is ineligible forever. The employee who comes to work with drugs in his or her system has violated a work rule, has placed company equipment, product, and perhaps even lives in jeopardy, and has abused the company's trust. The applicant who tests positive at the pre-employment stage has damaged only his own career options.

C. EEOC Guidance Confirms That the ADA Permits Enforcement of Conduct Standards and Does Not Require Pardons Due to Disability

The Equal Employment Opportunity Commission, the federal agency with enforcement authority over Title I of the ADA, consistently has interpreted the statute as permitting an

employer to enforce reasonable conduct standards, as long as they are applied consistently, even though it may mean that an employee faces discipline for conduct that can be traced to a mental or physical condition. For example, the preamble to the agency's 1991 regulations interpreting the ADA states that "employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards." 56 Fed. Reg. 35725, 35733 (July 26, 1991). In Section 902 of the agency's Compliance Manual, which addresses the definition of "Disability" under the ADA, the EEOC states that an employer "does not have to excuse [an employee's] misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees." EEOC Compl. Man. (BNA) § 902.2 n.11 (Feb. 2002).

The EEOC included a lengthy discussion of conduct issues in its *Enforcement Guidance: Psychiatric Disabilities and the Americans with Disabilities Act*, issued in 1997. There, the agency confirmed that an employer may hold individuals with disabilities to conduct standards that are "job-related and consistent with business necessity" as long as they do so consistently—that is, as long as they would mete out the same discipline to an employee with no disability. The agency mentioned company policies against workplace violence, theft, and destruction of property as examples of conduct rules that would be considered job-related and consistent with business necessity. *EEOC Enforcement Guidance: Psychiatric Disabilities and the Americans with Disabilities Act* (Mar. 25, 1997) at 30-32, *reprinted in* EEOC Compl. Man. (BNA) N: 2331, N:2340-41. The agency stated explicitly that an employer is not required to excuse past misconduct, *e.g.*, by rescinding a discharge once it learns that the conduct may have been caused by a disability. *Id.* at 31.

Similarly, the EEOC has confirmed that an employer's "reasonable accommodation" obligation under the ADA does not include forgiving past infractions. In enforcement guidance, the agency states that although an employer sometimes may have to make a reasonable accommodation to allow a qualified individual with a disability to meet a conduct standard in the future, it need not do so "where the punishment for the violation is termination." *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Mar. 1, 1999) at 35, *reprinted in* EEOC Compl. Man. (BNA) N:2465, N:2480 (footnote omitted). As the agency explained, "[s]ince reasonable accommodation is always prospective, an employer is not required to excuse past misconduct, even if it is the result of the individual's disability." *Id.* (citing *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666 (7th Cir. 1995)).

Accordingly, the federal agency with enforcement responsibilities for Title I of the ADA has interpreted that law as permitting employers to discipline employees for violating conduct rules, even if the misconduct may be traceable to a disability.

D. The ADA Unequivocally Supports Employer Efforts To Prevent Workplace Drug Use, Including Discipline of Employees Who Violate Their Rules

While drug addiction and alcoholism may qualify as disabilities under the ADA, the law explicitly approves employer conduct standards regarding the illegal use of drugs and the use of alcohol. The ADA permits employers to prohibit substance abuse at the workplace, 42 U.S.C. § 12114(c)(1), to prohibit employees from being under the influence of illegal drugs or alcohol at work, 42 U.S.C. § 12114(c)(2), to require employees to conform with the requirements of the federal Drug-Free Workplace Act of

1988, 41 U.S.C. §§ 701 *et seq.*, 42 U.S.C. § 12114(c)(3), and to require that employees comply with alcohol and drug abuse regulations adopted by the Departments of Defense or Transportation, or the Nuclear Regulatory Commission, if applicable. 42 U.S.C. § 12114(c)(5). Perhaps most importantly for purposes of this case, the ADA specifically permits employers to hold employees who use drugs illegally, and those who are alcoholics, to the same qualification standards as other employees. 42 U.S.C. § 12114(c)(4). The decision below conflicts with these unequivocal statutory provisions.

II. THE DECISION BELOW INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE TO EMPLOYERS

A. Employers Establish Work Rules for Legitimate and Nondiscriminatory Reasons

Many if not all employers have adopted rules that establish minimum standards for employee conduct in the workplace. Safety concerns provide one reason for having such rules. A worker who is fighting, threatening violence or merely engaging in horseplay that distracts other workers, or working carelessly or without protective equipment, can cause an accident, injuring himself, co-workers, and perhaps the public. Productivity expectations are another reason, giving rise to rules against insubordination, excessive absenteeism, repeated tardiness, and excessive personal telephone calls. Some conduct rules, such as those governing respect for co-workers, use of employer-provided e-mail, and the like, are based at least in part on legal requirements, such as potential employer liability for workplace harassment, and the like. Prohibitions against the use of drugs and alcohol fall in all three categories.

In virtually every company, violation of conduct rules can lead to discipline up to and including termination.

Enforcement of a conduct rule not only supports the legitimate goal underlying the rule itself, but encourages future compliance by other employees.

B. Considering Employees Who Have Been Terminated for Misconduct as Ineligible for Rehire Is a Common Practice Grounded in Legitimate Business Purposes

Like Hughes in this case, most companies view a termination for violating a work rule as a permanent bar to eligibility for rehire. The practice provides a neutral means of ensuring that anyone who has been fired once for an infraction so severe that it warranted the ultimate discipline is not accidentally rehired by someone who lacks access to the record.[4] Employees who have been fired for stealing, for stalking, threatening or assaulting another employee, for bringing a firearm to work, for being a serial sexual harasser, or for being under the influence of illegal drugs frequently fall in this category.

The practice is particularly common with respect to former employees terminated for violation of a company's prohibitions against drug abuse. For example, the U.S. Department of Labor, as part of its "Substance Abuse Information Database," which is designed as a resource for employers, maintains a booklet incorporating a model "drug free" policy which provides that employees terminated for drug use following company sponsored rehabilitation "will be

[4] The customary practice of marking on such an employee's file that he or she is "ineligible for rehire" allows those who may be involved in that individual's future application to make appropriate decisions without revisiting the original infraction. It serves two purposes. First, it guarantees the finality of business decisions that were appropriate when made. Second, it actually protects the individual, since the designation "ineligible for rehire" is sufficient unto itself and obviates the need for someone who was not involved in the original decision to delve into all of the often unsavory details surrounding it.

ineligible for rehire." United States Dep't of Labor, *What Works: Workplaces Without Alcohol and Other Drugs* (1994) (Appendix A: Workplace Substance Abuse Policy Models, Sample 2: Drug-Free Policy of (Company B), at 23 [p. 7 of .pdf]) [5]. Such varied employers as a concessionaire at Mt. Rushmore [6], the Mt. Vernon Community School Corporation in Fortville, Indiana [7], and the Johns Hopkins Health System (which marks *any* employee discharged for any reason other than job performance ineligible for rehire)[8], have all adopted the same practice. Indeed, a company that performs pre-employment screening reported earlier this year that 11% of the employers the company contacted as part of the 2.6 million background verifications it performed in the year 2001 reported applicants ineligible for rehire. Automatic Data Processing, Inc. (ADP) Hiring Index (2001).[9]

C. The Decision Below Seriously Undermines an Employer's Ability To Enforce Its Conduct Standards

The Ninth Circuit's decision results in an automatic right to a "second chance" to any worker fired for misconduct, even

[5] *available at* http://www.notes.dol.gov/said.nsf/e70e2e0197c60a7f8525641f0061318e/A2B332B1DD5C41838525641F00627DE8?OpenDocument&ExpandSection=4

[6] Xanterra Parks and Resorts, *Mount Rushmore Drug and Alcohol Policy*, *available at* http://www.coolworks.com/rushmore/policy.htm (last visited Dec. 11, 2002).

[7] Mt. Vernon Community School Corp., *Policies and Bylaws*, *available at* http://www.mvcsc.k12.in.us/4000.html#eap (last visited Dec. 11, 2002).

[8] Johns Hopkins Health System, *Employee Handbook—Non-Represented Employees* (Separation), *available at* http://www.hopkinsmedicine.org/jhhr/hbook_nb.htm#nbu36 (last visited Dec. 11, 2002).

[9] *available at* http://www.investquest.com/iq/a/aud/ne/news/adpmisleading.htm

drug use,[10] if he or she can somehow tie the infraction to a disability. Based on the Ninth Circuit's reasoning, an employer would be liable under the ADA if it refused to rehire a former employee who was terminated for attacking a co-worker or customer, for embezzling company funds, for sexual harassment, for extreme or repeated carelessness, for boisterous and disruptive behavior, for execrable performance, or any number of other legitimate reasons, as long as the former employee can claim that the misconduct stemmed from a disability. Even if the would-be plaintiff fails to qualify as an "individual with a disability" under the ADA and this Court's decision in *Toyota Motor Manufacturing, Inc., v. Williams,* 534 U.S. 184 (2002), the employer will still have faced the threat, or indeed the promise, of costly litigation merely because it sought to uphold a legitimate work rule it established in order to run its business properly.

Accordingly, the decision below ties the hands of every employer that desires to maintain discipline in its workforce, to guard against safety hazards, comply with legal requirements, ensure product and service quality, maintain its

[10] Drug abuse remains a serious problem for employers. According to the recent *National Household Survey on Drug Abuse* report, in the year 2000, 8.1 percent of full-time workers aged 18-49 reported heavy alcohol use in the past month, and 7.8 percent reported illicit drug use. Office of Applied Studies, Substance Abuse and Mental Health Services Administration (SAMHSA), *National Household Survey on Drug Abuse* (Sept. 6, 2002) (In Brief), *available at* http://www.samhsa.gov/oas/2k2/workers/workers.pdf, at 1. According to a 1995 survey by the Gallup Organization, commissioned by the Institute for a Drug-Free Workplace, 35% of employees surveyed responded that they were aware of illicit drug use by their co-workers on-the-job. Institute for a Drug-Free Workplace, *What American Employees Think About Drug Abuse* (1995) (Figure 13: Awareness of On-The-Job Illicit Drug Use By Co-Workers), *available at* http://www.drugfreeworkplace.org/survey/page23.html.

reputation, and promote an atmosphere that is conducive to retaining good employees. No termination will ever be final. In addition, the Ninth Circuit's rule also has the consequence of placing employers in the untenable position of having to consider for rehire former employees who present a known and demonstrated hazard.

The decision below thus undermines the best practices of good employers, who maintain progressive discipline procedures that give employees every chance to succeed. It also counteracts those efforts of good employers who, as Hughes did here, provide and pay for rehabilitation for substance-abusing employees and resort to termination only after such efforts fail.

CONCLUSION

We respectfully request that the Court grant the petition for a writ of certiorari and consider summary reversal.[11]

Respectfully submitted,

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[11] For the reasons set forth in the Petition, *amicus curiae* EEAC strongly supports Petitioners' position that this case is particularly appropriate for summary reversal.